DISTRICT PLANTATION SERVICES SDN BHD *a*

v.

AHMAD NAZRI ADNAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR *b*
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R3-25-6-1999]
26 JULY 2000

LABOUR LAW: *Employment - Dismissal - Misconduct of specific and serious nature - Whether different from ordinary misconduct - Whether particular misconduct must be clearly specified - Whether workman must be given right to be heard and defend himself - Whether must produce cogent evidence to show that offences alleged were committed* *c*

LABOUR LAW: *Employment - Dismissal - Departure from procedure - Procedure not covering peculiar events occurring on day of alleged misconduct - Whether procedure departed from* *d*

ADMINISTRATIVE LAW: *Remedies - Certiorari - Decision challenged on ground of 'Wednesbury unreasonableness' - Whether court may go into merits of decision* *e*

This was an application for an order of *certiorari* to quash the decision of the Industrial Court that the first respondent was wrongfully dismissed by the applicant. The services of the first respondent were terminated with immediate effect by way of a letter of termination on grounds of alleged misconduct. The two grounds of alleged misconduct were that the first respondent was involved in the improper and deliberate disposal of 2,178 bags of fertilizer and that the method in which he made payments for them was contrary to the procedure provided. *f*

The grounds for applying to quash the said decision were: (i) the Industrial Court committed errors of law and/or acted unlawfully and/or in excess of its jurisdiction or power by basing its decision on irrelevant facts and omitting to address relevant ones in concluding that the first respondent was unfairly dismissed without just cause or reason; and (ii) that the said decision was jurisdictionally bad for 'Wednesbury unreasonableness' in that no reasonable court similarly circumstanced would have concluded, on the facts available, that the first respondent was not guilty of misconduct warranting immediate dismissal. *g* *h*

i

Held:

[1] When a decision is challenged on the ground of 'Wednesbury unreasonableness', the court may extend its judicial parameters and examine the merits of the decision itself as opposed to being confined to an examination of the decision making process only.

[2] The misconduct alleged against the first respondent was of a singular and serious nature; a mismanagement that could and should be distinguished from ordinary misconduct. Ordinary misconduct operates based on a series of patterns that emerge in relation to a workman's behaviour and attitude such as tardiness, lack of punctuality, alcoholism and other such misbehaviour. However, in the instant case, the charge faced by the first respondent was of a specific and serious nature. In such an instance, having regard to the principles of natural justice, an employer must clearly specify the particular misconduct and afford the workman the right to be heard and defend himself.

[2a] Having specifically made a charge against the first respondent, the applicant's evidential cogency to establish proof as against the first respondent was severely lacking in the following areas: (i) none of the applicant's witnesses could state that the first respondent was aware of the disposal of the 2,178 bags of fertilizers; (ii) there was no evidence led by the applicant to prove that the first respondent instructed or was involved in the deliberate disposal of the fertilizers and, in fact, it was not even established that he was aware of the incident; (iii) the first respondent's evidence that he knew of the disposal only two months after its occurrence was unchallenged and unshaken; (iv) the applicant's failure to call two material witnesses justified the Industrial Court invoking s. 114(g) of the Evidence Act 1950 to draw an adverse inference against the applicant; and (iv) the applicant did not call a certain Kamaruzaman even though evidence was given by the applicant's own witness that he allegedly disposed the fertilizers upon Kamaruzaman's instructions.

[3] As regards the second ground of alleged misconduct, the applicant had not led any evidence to show that there were provisions to facilitate the method of making payments in the situation that the first respondent found himself in on the day in question. In the absence of such procedure for payment, the question of a departure from procedure did not arise. Thus, the Industrial Court was justified in concluding that the first respondent was not guilty of any misconduct when he effected payment in cash and not by cheque.

[Application dismissed with costs.]

Case(s) referred to:

North Eastern Transport Service Ltd & Transport Workers Union (Award No 8 of 1964) ***(refd)***

Kumpulan Perangsang Selangor Bhd v. Zaid Hj Mohd Noh [1997] 2 CLJ 11 ***(foll)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 ***(foll)***

Stamford Executive Centre v. Puan Dharsini Ganesan [1986] 1 ILR 101 ***(refd)***

W Weddell & Co Ltd v. Tepper [1980] IRLR 76 ***(refd)***

Legislation referred to:

Evidence Act 1950, ss. 101, 102, 103, 104, 105, 106, 114(g)

For the applicant - Vincent Chandran; M/s Badaruzaman, Chandran & Co
For the respondent - Burhanudeen Abdul Wahid; M/s Shafee & Co

Reported by S Dharmendran

JUDGMENT

Faiza Tamby Chik J:

This is an application of a notice of motion dated 17 August 1999 for an order of *certiorari* sought by the applicant to quash the Industrial Court Award No. 649 of 1998 dated 15 December 1998. Briefly the facts are that the 1st respondent was at all material times employed as the manager of Ladang Pelating Jernih (the applicant) at Bahau, Negeri Sembilan. The services of the 1st respondent was subsequently terminated *vide* a letter of termination dated 9 September 1996 issued by the applicant premised on various alleged grounds of misconduct. Upon the matter being accorded a full hearing by the Industrial Court (the 2nd respondent), the court on 15 December 1998 delivered an award in favour of the 1st respondent for wrongful dismissal without just cause or excuse and moved for damages to be paid to the 1st respondent by the applicant for the total sum of RM123,500 within one month from the date of the award subject to income tax, EPF and other such deductions, if any. The applicant being dissatisfied with the findings of the Industrial Court filed this notice of motion to move this court for *certiorari* and have the award quashed.

Upon a perusal of the various grounds raised by the applicant to this notice of motion challenging the decision of the 2nd respondent, the main points of contention that require judicial deliberation may be broadly summarised as follows:

(i) That the 2nd respondent in delivering Award No. 649 of 1998 ("the said Award") committed errors of law and/or acted unlawfully and/or in excess of its jurisdiction or power by basing its decision on irrelevant facts and omitting to address relevant ones in concluding that the 1st respondent was unfairly dismissed without just cause or reason.

(ii) That the said Award was jurisdictionally bad for 'Wednesbury unreasonableness' in that no reasonable court similarly circumstanced would have concluded on the factual matrix available that the 1st respondent was not guilty of misconduct thereby warranting immediate dismissal.

(i) Whether The 2nd Respondent Acted Unlawfully And/or In Excess Of Its Jurisdiction In Arriving At The Said Award

The services of the 1st respondent was terminated with immediate effect on the grounds of alleged misconduct advanced by the applicant ascertained in the Letter of Termination dated 9 September 1996. The said letter is exhibited as **exh. "PB-11"** in the notice of motion and has also been fully reproduced at pp. 2 to 4 of the Award itself which appears in the notice of motion. The five instances of alleged misconduct levied against the 1st respondent are:

(1) Improper and deliberate disposal of 2178 bags of CIRP fertilizers;

(2) Making subsequent payment for the above mentioned bags of fertilizers in suspicious circumstances and without proper verification;

(3) Incapability in financial administration which has resulted in excess cash balance at the end of the month, this violating the company policy;

(4) Inefficient and ineffective day to day administration of the estate resulting in disharmony, non-cooperation, discord and confusion among staffs which affected the overall performance of the estate;

(5) Generally, as a manager, the 1st respondent was incompetent and failed to provide leadership and direction.

It is observed that in delivering the said Award, the main reason extended by the 2nd respondent in deciding in favour of the 1st respondent is that the applicant had failed to discharge the onus of proving the commission of the specific misconduct by the 1st respondent on a balance of probabilities (refer to pp. 17, 18 and 19 of exh. "PB-11" of Award). At this juncture, it must be borne in mind that the applicant has also submitted on general issues of mismanagement that were leveled at the 1st respondent, mainly expanding on reasons 3 to 5 as contained in the letter of termination *(supra)*, namely, *inter alia*, that the 1st respondent was guilty of general negligence in failing to manage the estate adequately both in a financial and general administrative capacity.

This issue has been placed under the heading expanding upon reason 1 in the letter of termination concerning the disposal of the 2178 bags of fertilizers although in reality, they are two entirely separate issues and charges of mismanagement. It is observed here that the applicant has chosen to address these issues in the notice of motion despite not leading a shred of evidence to lend support to any of those allegations during the trial, hence correctly prompting the learned president to disregard these issues of general mismanagement. It is trite law that an allegation or claim asserted by a party must be evidentially substantiated (see s. 101 to s. 106 of the Evidence Act 1950.) The 2nd respondent appropriately directed its mind only to the issues of misconduct to which evidence was led by the applicant which are reasons 1 and 2 as stated in the letter of termination. In the light of the fact that the applicant had failed to adduce any evidence to lend credence to general claims of mismanagement and negligence the 1st respondent was allegedly guilty of, these matters were not considered during trial and hence warrant no judicial consideration by me.

In respect of the allegation by the applicant that the 1st respondent was responsible for the deliberate disposal of 2178 bags of fertilizers into a mining pool, the 2nd respondent opined that the applicant had fallen short of proving that the 1st respondent directed or instructed that the bags of fertilizers be dumped into the mining pool and was involved in their deliberate disposal or that he even knew of such an incident at the material time. As such the learned president found that the applicant had failed in discharging its burden of proving misconduct on the part of the 1st respondent on a balance of probabilities. The applicant, in its present grounds has challenged the evidential weight attached by the 2nd respondent to prove 'misconduct' on the 1st respondent's part. The applicant contended that the fact that several of its witnesses, namely COW2 Hussein bin Ali and COW3 Ismail bin Musa witnessed the incident of disposing off the bags of fertilizers with the additional factor that the 1st respondent paid the contractor in full for the application of 2178 bags of fertilizers in itself invited a charge of mismanagement. The applicant proceeded to further substantiate its argument that the failure of the 1st respondent to address the issue by himself upon being informed of the incident further compounded the fact that indeed the 1st respondent was responsible and was involved in the improper and deliberate disposal of the fertilizer bags.

After a careful perusal of the Award and the evidence adduced in the instant case, I come to the conclusion that the 2nd respondent's decision is judicially sound and within the jurisdiction of the 2nd respondent without exhibiting any error in law, and is within the factual matrix presented

before the court and that the 2nd respondent arrived at the appropriate decision which any other reasonable tribunal in like circumstance would have made. Recent judicial pronouncements have clearly indicated that when a decision is challenged on the grounds of 'Wednesbury unreasonableness', the court may extend its judicial parameters and examine the merits of the decision itself as opposed to merely confining itself to an examination of only the decision-making process. (See *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147). In *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Hj. Mohd. Noh* [1997] 2 CLJ 11, at p. 23, Gopal Sri Ram JCA opined:

> ... It must be borne in mind that the principal ground of complaint advanced by the respondent before the learned judge was that the award was perverse. That is simply another way of saying that the award was one which no reasonable tribunal in the circumstances would have made. In public law, this proposition is known as 'Wednesbury unreasonableness' a shorthand form to summarize the Delphic pronouncement by Lord Greene in *Associated Provincial Picture House Ltd. v. Wednesbury Corp* [1948] 1 KB 223. It is one of the well recognised ground upon which the decision of a public decision-maker may be challenged in the courts.
>
> Until very recently, it was generally thought that when a decision is challenged on grounds of 'Wednesbury unreasonableness', the court is confined to an examination of the decision-making process and not the merits of the decision itself. That is an error perpetuated by adherence to a narrow doctrinaire approach without analyzing later judicial pronouncements that had addressed the subject. The fallacy of the doctrine that judicial review is always confined to the decision-making process and never with the merits of the decision itself was exploded by the landmark decision of this court in *R. Rama Chandran v. The Industrial Court of Malaysia & Anor*. [1997] 1 MLJ 145.

In embarking upon an evidential examination of the facts available before the 2nd respondent, I am of the view that the current form of misconduct levied against the 1st respondent was of a singular nature and serious, a mismanagement that can and should be distinguished from ordinary misconduct. The latter operates based on a series of patterns that emerge in relation to a workman's behaviour and attitude such as tardiness, lack of punctuality, alcoholism and other such misbehaviours. However, in the instant case, the charge faced by the 1st respondent was of a specific and serious nature. The courts have time and again stressed on the need of an employer in such circumstances to clearly specify the particular misconduct and afford the workman the right to be heard and defend himself in keeping with the principles of natural justice. (See *North Eastern Transport Service Ltd. & Transport Workers Union* (Award 8 of 1964) (pg. 195 of Dunston) which commented that unless there is clear evidence to support

the charge of misconduct, the employer's decision against the employee will not be upheld by the court.) This approach was endorsed in cases such as *W. Weddell & Co. Ltd. v. Tepper* [1980] IRLR 76 wherein Stephen LJ commented:

> Employers suspecting an employee of misconduct justifying dismissal cannot justify their dismissal simply by stating an honest belief in his guilt. There must be reasonable grounds, and they must act reasonably in all the circumstances, having regard to equity and the substantial merits of the case. They do not have regard to equity in particular if they do not give him a fair opportunity of explaining before dismissing him. And they do not have regard to equity or the substantial merits of the case if they jump to conclusions which it would have been reasonable to postpone in all the circumstances until they had, per Arnold J in *Burchell*, carried out as much investigation into the matter as was reasonable in all the circumstances of the case. That means that they must act reasonable in all the circumstances, and must make reasonable enquiries appropriate to the circumstances. If they form their belief hastily and act hastily upon it, without making the appropriate enquiries or giving the employee fair opportunity to explain himself, their belief is not based on reasonable grounds and they are not acting reasonably.
>
> (cited at pp. 196-197 of *Industrial Relations in Malaysia* by Dunston Ayadurai)

Turning to the facts at hand, the applicant specifically levied a charge against the 1st respondent as reflected as reason 1 in the letter of termination. The applicant's evidential cogency to establish proof as against the 1st respondent was severely lacking in the following areas that prevented it from discharging its burden of proof adequately:

1. None of the applicant's witnesses could state that the 1st respondent was aware of the disposal of 2178 bags of fertilizers into the mining pool. COW3, Ismail bin Musa in his testimony (see exh. 'VC1') said:

> I witnessed the throwing of the fertilizer bags into the pond.
>
> My estate manager at that time was Encik Nazri. In the incident 1,000 plus bags of fertilizer was involved.
>
> I wrote in the correspondence book that the work was not done satisfactorily.
>
> On 10.10.5.96 I went to the office at 10.00 morning to see the assistant Manager – Ben. After that we decided to go to Bahau for shopping. At the same time I saw contractor Hussin standing outside the office. After that Kamaruzaman came out from the office and he told me that the manager called him for manuring. I and Ben were going off.

Around 3.00 p.m. to 4.00 p.m. the same day, Kamaruzaman came to my house and asked me to help him, there was short of labour and transport. I helped him – I arranged 8 workers and 1 tractor. After that I left for home. At 4.30 p.m. they started loading the fertilizer from the store. I was there. After that I went back home about 7.00 p.m. to 8.00 p.m. Kamaruzaman came and asked me to help him to counter check the fertilizer bags in the store. After that I went home. Around 10.00 to 11.00 o'clock at night he came again and I asked him where he did the manuring and he told me he already threw the fertilizer into the pond. I saw the throwing of the bags. I saw him going at 11.30 p.m. until 1.30 a.m. I never asked him who told him to throw the bags. I was surprised.

The store is big – there were 2,000+ bags.

Some bags were applied. Some were thrown away into pond.

The next day the directors came.

I don't know whether the manager knew or not about this. He lived in the estate.

2. There was no evidence led by the applicant to prove that the 1st respondent instructed nor was involved in the deliberate disposal of the fertilizers. In fact, it was not even established as to whether he was aware of the incident to begin with.

3. Uncontroverted evidence was led by the 1st respondent that he knew only of the alleged disposal two months after the occurrence of the said incident and that upon a visit to the pool, there was no trace of any disposal. In querying his immediate subordinates the 1st respondent was not afforded any information and therefore decided not to pursue the matter further due to lack of evidence. His evidence on this matter has remained unchallenged and unshaken. Reference is made to p. 15 of exh. 'VC1' Notes of Evidence wherein the 1st respondent stated:

Kanan reported to me in June 1996 of the incident. When I received the report I went to visit the area of the pool. At the scene there was no evidence seen that the fertilizer had been dumped. No fertilizer could be seen in the pond. When I inspected it, it was two months later. That was my first step. After that I considered it was baseless to take up the matter.

I inquired from Kamaruzam but he was unwilling to give me the answer. He was appointed by my assistant to apply the fertilizer – to be the head of the fertilising. The information that Kanan gave me, he told me that Kamaruzaman said that the fertilizer was dumped in the pond. But he was uncooperative.

I spoke to Ismail bin Musa but he was uncooperative, he denied it.

4. No factual evidence led by the applicant linked the 1st respondent in any manner whatsoever to the alleged incident of disposing off the fertilizers.

5. The applicant failed to call two material witnesses, Kanan Palanysamy and Haslan bin Harun who according to the applicant's first witness, Peter Benjamin (COW1) were the first to provide information that led to the investigations in relation to the fertilizer disposal incident. Under the circumstances the 2nd respondent wisely invoked s. 114(g) of the Evidence Act 1950 and drew an adverse inference against the applicant.

6. The applicant further did not call a certain Kamaruzaman even though evidence was adduced by the applicant's own witness, COW2 Hussin bin Ali that he allegedly dumped the fertilizers into the mining pool upon Kamaruzaman's instruction. Page 6 of exh. 'VC1" states:

> Saya ambil kontrak maintenance dengan Syarikat. Ini surat saya.
>
> Saya nampak bag dimasuk dalam kolam – pukul 11.00 malam.
>
> Saya dimaklumkan oleh Kamarulzaman. Saya kerja meracun di ladang. Pada hari 10.5.96 Kamaruzaman minta tolong saya buang baja.

Basic legal requirement would demand that an employer must produce cogent evidence that the workman committed those offences which were alleged to have been committed which had attracted the punishment of dismissal. The above proposition was exhibited in *Stamford Executive Centre v. Dharsini Ganesan* [1986] 1 ILR 101 where the court opined:

> It may further be emphasised here that the employer must produce convincing evidence that the workman committed the offence(s) he is obliged to have committed and for which he has been dismissed. The burden of proof lies on the employer. He must prove the workman guilty, and it is not the workman who must prove himself not guilty. This is so basic a principle of industrial jurisprudence that no employer is expected to come to this court in ignorance of it. (see *Dunston* at p. 197).

Bearing in mind the factual matrix outlined above, the 2nd respondent expressed its dissatisfaction in that the applicant had failed to discharge its onus to prove the specific misconduct that the applicant was alleged to have committed. See pp. 18 and 19 of 1st para. of the Award which states:

> In the circumstances the court opines that the company has failed to prove its allegation that there existed a profit-sharing business between the claimant and the contractor.

> After considering the totality of the evidence the court comes to the inevitable conclusion that the company has failed to establish on a balance of probabilities that its stated reasons were the real reasons for dismissing the claimant. On the basis of this finding the court holds that the dismissal of the claimant could not have been *bona fide*. In the final analysis, having regard to the evidence, facts and the law the court holds that the dismissal of the claimant was made arbitrarily, constituted an unfair labour practice and was without just cause and excuse.

The 2nd reason for dismissal preferred by the applicant against the 1st respondent as evidenced in the letter of termination is that the applicant accused the 1st respondent of effecting a payment to the contractor who allegedly applied the 2178 bags of fertilizers under suspicious circumstances without proper verification. The applicant's contention in support of this ground for dismissal was that the payment for the above application of the fertilizer was done without the proper procedural requirement of submitting a work completion certificate (indicating that the particular job had been finished), that the payment was made in cash when there was a standard operating procedure that prevents any payment above RM1,500 to be made in cash. To the above contention, the 1st respondent's evidence was uncontroverted and unchallenged as evidenced at p. 20 of 'VC1' Notes of Evidence which states:

> On 10.5.96 there were many workers. They were under different kepalas, – so Kamaruzaman was appointed the chief kepala. They were from various permanent contractors. This was the first time, many contractors for the mission. There are no guidelines for payment in this instance. There were so many workers, so payment made in cash. Since Kamaruzam informed Ben that they need to be paid in cash for this work. I don't know why.

If the cheque is issued, it would be to Kamaruzaman.

I did not think it safe to do this, most of the workers were not under him. He needed time to clear cheque. That was one of the reasons I departed from procedure.

As a whole – the payment by cash tallies with the amount of the bags applied. RM2,178 for 2178 bags.

That was not the usual price. Usually on hectare basis.

When payment was due I was not aware of any misappropriation that would stop me from issuing the payment.

The payment whether by cash or cheque does not benefit me. The price RM1 per bag was fixed by me.

Q: Were you aware of some allegations that revealed RM200 as kickback after the payment made?

A: No.

In view of the bulk of the fertilizers that needed to be applied that particular day, workers under several heads or kepalas jointly assisted in completing the task. At this juncture it must be observed that the applicant afforded no guidelines governing payment in a situation where payment has to be regulated for workers from various kepalas on a single assignment. As submitted at the trial, the 1st respondent contended that in the absence of such procedure for payment, the question of a departure from procedure did not arise. The evidence given by the 1st respondent has also been unshaken and uncontroverted. The applicant had not led any evidence to indicate that they had provisions to facilitate the governing of payments peculiar to this situation thus justifying the 2nd respondent's conclusion that the 1st respondent was not guilty of any misconduct when effected payment to the contractor in cash and not cheque. Page 18 of Award para. 2, the 2nd respondent states, "For the above reasons the court is of the view that the claimant is not guilty of any misconduct when he made the payment to the contractor in cash and not in cheque." The 2nd respondent had in arriving at the said Award judicially considered all evidential material before it as systematically mapped out at pp. 7 to 18 of the Award. It is quite apparent from the passages referred to in the judgment that the learned president was entirely aware of the nature of the jurisdiction that she was called upon to exercise, which she did by applying the appropriate tests and by reasoned deliberation.

Based upon the above reasons, I come to the conclusion that the 2nd respondent in delivering Award No. 649 of 1998 did not commit any errors of law or acted unlawfully or in excess of its jurisdiction or power or by basing its decision on irrelevant facts and omitting to address relevant ones in concluding that the 1st respondent was unfairly dismissed without just cause or reason, and that the said Award is not jurisdictionally bad for 'Wednesbury unreasonableness' in that no reasonable court similarly circumstanced would have concluded on the factual matrix available that the applicant was guilty of misconduct thereby warranting immediate dismissal. Upon the above premise, I hereby dismiss the applicant's notice of motion with costs.